In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 289

GLENN DOHERTY, LOUIS BERTUCCI, MORRIS ABRAMS, WILLIAM McCABE AND JOHN ZOBOWCHAK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on June 16, 1964 (Pet. App. 17-21). The petition for a writ of certiorari was filed on July 16. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused a blanket request to read the grand jury testimony of all government witnesses in order to check for inconsistencies.

2. Whether the instructions to the jury adequately covered the issue of intent.

STATUTE INVOLVED

Section 610 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541 (29 U.S.C. 530) provides:

> It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Eastern District of Pennsylvania of conspiring to restrain, and of restraining, union members from exercising their rights in the union, in violation of 18 U.S.C. 371 and 29

U.S.C. 530 (I. 1–20, II. 569–571).[1] All of the petitioners were fined and sentenced to imprisonment for two years. In addition, some received periods of probation (II. 581–584). The convictions were affirmed on appeal.

The evidence may be summarized as follows:

Some of the members of Teamsters Local 161, which was composed principally of employees of the Philadelphia Transportation Company, wished to have various changes made in the union; to that end they organized a committee called SWEEP (I. 35, 76–79). On October 29, 1961, the union held a meeting which was adjourned before any member of SWEEP could be heard (I. 79–82, 108–109, 164–166). Thereafter, SWEEP members sought the aid of the district court to enforce their union rights. This resulted in a consent order postponing the postal referendum on a proposed collective bargaining contract from February 2, 1962, until after a meeting to be held on February 22, 1962 (I. 82–88). In order to forestall any action by SWEEP, the executive board of Local 161 decided to expel nine members of SWEEP and to refuse them admission to the meeting. When Edmund Flounders, a SWEEP member whose name was not on the list of expellees, was refused admission, a fight ensued. Flounders was severely beaten, another SWEEP member was injured and still other members of SWEEP were told by petitioners to leave the meet-

[1] The record consists of certified copies of the appendices prepared for the court of appeals and certified copies of the proceedings in the court of appeals. References to petitioners' two-volume appendix below will be by volume and page. The government's appendix will be referred to by the prefix "G."

ing (I. 89–91, 112–114, 167–170, 174, 190, 213–215, 226–228, 281–285, 325–327, 334–339; Govt. Ex. 17; II. 619; I. 130).

ARGUMENT

I. During the course of its direct examination of Edmund Flounders, the government, pleading surprise, used Flounders' grand jury testimony; it made this material (as well as all other relevant statements) available to the defense (I. 45, 61–62).

At the close of the direct testimony of the next witness, defense counsel obtained an extra-judicial statement of the witness pursuant to 18 U.S.C. 3500. He then stated (I. 94–95):

> This is the first witness for which I have had the occasion to do this but under the authority of the Giampa case last year in the Second Circuit I am going to ask Your Honor to examine in camera the Grand Jury testimony of all persons who testified for the Government and if inconsistencies are found to turn them over to the defense to utilize in cross examination.
>
> MR. DEPAUL. The government has no objection.
> THE COURT. Very well.

No requests for grand jury minutes were made during the examination of further government witnesses (see I. 139, 153, 171, 193, 209, 215)[1] until police officer George Kaczur finished his direct testimony. Defense counsel thereupon demanded his grand jury

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[1] In *United States v. Giampa*, 290 F. 2d 83, the Second Circuit held that, upon request, the trial judge should inspect grand jury minutes for inconsistencies.

Requests for producible statements under 18 U.S.C. 3500 were, however, made and granted. See citations in text.

testimony, and the court took the matter under advisement (I. 245–246). The following morning, the trial judge ruled that he would not make grand jury testimony generally available to the defense but would make it completely available in the situation where there was a claim of surprise (I. 255–256). There were no further requests for grand jury minutes. The defense, however, was provided statements by the various witnesses. (See I. 285, 310, 343.)

Subsequently, on the motions for a new trial and judgment of acquittal, further reference was made to the broad demand for grand jury testimony and the specific request in connection with the testimony of the officer. The judge noted at this point that he had in fact read the grand jury testimony of that witness and found nothing in it at variance with the testimony the witness gave at the trial. He stated further that he did not feel that he had the duty of reading through the testimony of all the witnesses to see whether there was any variance (I. 206–207).

Petitioners are apparently contending for a rule which would require district judges to read the grand jury testimony of all witnesses and to comb it for possible inconsistencies whenever they are requested to do so. There was no showing, we emphasize, of any "particularized need" (see *Pittsburgh Plate Glass* v. *United States*, 360 U.S. 395) in this case—merely a request at large.[1] There is no suggestion in

[1] It is doubtful whether a mere wholesale request is sufficient under *United States* v. *Gilmore*, 290 F. 2d 83, 85 (C.A. 2). This is not to deny that the Second Circuit practice goes further than that of the other circuits.

any decision of this Court that it is incumbent upon the district courts to assume this onerous burden whenever the defense bids it—a rule which would make the request virtually automatic. *Pittsburgh Plate Glass* points clearly in the contrary direction. In the very excerpt quoted by petitioners (Pet. 14), this Court observed that the defense had not requested the judge to read the grand jury testimony and had therefore failed to "invoke [his] discretion." Since petitioners here failed to make any showing whatever in support of their wholesale request and since they were freely granted access to all other potentially impeaching materials, there assuredly can be no claim of abuse of discretion. We submit that there is no occasion for this Court to consider a departure from the salutary rule that there is no automatic duty upon the trial court to read grand jury transcripts in a "hunt for possible inconsistencies." *Berry* v. *United States*, 295 F. 2d 192, 196 (C.A. 8), certiorari denied, 368 U.S. 955.

2. The trial judge charged the jury that an element of the offense was the intent to deprive the members of their rights in the union (II. 557). He then instructed (II. 558) that an

> * * * act is done wilfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose * * *.
>
> You will note that the acts charged in the indictment are alleged to have been done

> "knowingly." The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reasons.

He also charged on the requirement of specific intent, saying[5] (II. 558):

> With respect to offenses such as charged in this case, specific intent must be proved before there can be a conviction.
>
> * * * *
>
> Specific intent * * * requires more than a mere general intent to engage in certain conduct.
>
> A person who knowingly does an act which the law forbids, * * * intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

Under these instructions the jury could not convict petitioners "simply because Flounders was in a fight" (Pet. 25).

The court properly rejected petitioners' request for a series of charges which were designed to focus upon who "threw the first punch." As the trial judge noted, this was not an assault and battery case (II. 565; see also G. 207–208). The statute could be violated by threats without actual violence. Indeed, this is precisely what happened to some members of SWEEP. For example, one of the petition-

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[5] *Screws* v. *United States*, 325 U.S. 91, cited extensively by petitioners, provides no support for their position because the trial judge did in fact require that the action be with specific intent.

ers threatened Mrs. McKay and Mrs. Corr in the meeting hall with the words—"Well, my orders are both blondes go" * * * "Don't make me have to put you out" (I. 104). See also I. 168–169. The question of who committed the first act of violence was not the significant issue in this cause. The issue, which was properly submitted to the jury, was the use of violence or threats for the purpose of preventing the exercise of union rights by union members.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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